APPEAL NO. 93329

On March 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue determined at the contested case hearing was whether the claimant had timely notified her employer, the (employer), of her injury that occurred (date of injury). The employer is a state agency covered by the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8309g (Vernon Supp. 1993) (1989 Act). The hearing officer determined that claimant gave notice of her injury on (date of notice).

The carrier has appealed, arguing that it was error for the hearing officer to admit, over objection, a purported page from a logbook dated (date of notice), in that the page had not been exchanged. Although the carrier notes that there was no testimony offered that a supervisor was notified about claimant's injury, it has not appealed the hearing officer's determination that timely notice was given. The carrier attaches to its appeal interrogatories which were not tendered into the record below. The claimant responds that there is no reversible error because this logbook page was not the sole item of evidence relied upon by the hearing officer.

DECISION

After reviewing the record, we affirm the decision of the hearing officer, finding no reversible error in erroneous admission of the purported logbook page.

The claimant initially stated that she was injured on an unspecified date between May 25, and (date of notice), which she later agreed, based upon her claim, was (date of injury). There are no details set forth in the record as to how the injury occurred, and the injury is only generally described in the record as neck and shoulder, perhaps because the fact of an injury was not in issue at the contested case hearing. The claimant said that she worked until she could no longer stand it, and that she went to see (Dr. P) on May 30th. Dr. P issued an "off work" status note that took claimant off work until June 18, 1991. The claimant testified that she took this slip to work and gave it to her immediate supervisor, "O," and told her of her injury. She was instructed by O to make a copy of Dr. P's notice and take it to personnel, and she did so. On June 18, 1991, claimant applied for light duty but this was refused due to unavailability; the signature on this denial was identified as that of LS of personnel. The claimant also recalled filling out an injury report at the evening supervisor's station on (date of injury), but did not have a copy at the hearing.

Also in evidence was an employer's supplemental report of injury dated (date of notice), signed by JM, claims coordinator, indicating that claimant began to lose time on (date of notice). The date of injury shown on this form, however, is September 5, 1990. Claimant filed a claim on September 21, 1992, contending that she injured herself on September 5, 1990, and reinjured herself on (date of injury).

Claimant tendered a page from what she described as a logbook kept by the

employer to make notes about the clients and employees. This indicates that on (date of notice), claimant reinjured herself. Claimant asserted that she got the copy from "O" the Wednesday before the contested case hearing (which was on a Tuesday). The carrier objected on the basis that it had not seen the document before that morning and it had not been exchanged as required by the Texas Workers' Compensation Act (1989 Act). The carrier also objected based upon failure of authentication as a business record. Without making any finding as to good cause, the hearing officer merely "noted" carrier's objection and admitted the document. It is this action of which carrier complains on appeal. Carrier presented no witnesses in its case in chief.

As to the authentication point, we would note that conformity to the Rules of Evidence is not required by the 1989 Act, Article 8308-6.34(e). The hearing officer could have determined that claimant's description about the logbook and its purpose was sufficient authentication.

However, it was error for the hearing officer to admit the document, which had not been exchanged, absent a showing and a finding of good cause. It was simply inadequate for the hearing officer to merely note carrier's objection to an unexchanged document. In light of the late receipt of this document by the claimant, there may well have been facts upon which the hearing officer could have based a good cause finding. Nevertheless, there was neither a showing nor finding of good cause, and the exhibit was therefore improperly admitted. (We so hold because of the express wording of the statute, and do not regard as persuasive the carrier's protestations of "surprise" in counsel's failure to obtain copies of a document that would clearly seem to have been of the nature that rudimentary investigation would have disclosed. Nor does "surprise" account for the lack of any rebuttal witnesses to controvert claimant's statement that she told her immediate supervisor of her injury on (date of notice).)

However, we agree with the claimant that admission of this document was not reversible error. Given claimant's uncontroverted testimony that she told her supervisor "O" of her injury, and given further evidence that the employer appreciated that a work-related injury had occurred enough to file a supplemental report of injury, there is sufficient evidence underlying the hearing officer's determination that timely notice was given. The log page is not the sole piece of evidence in support of the hearing officer's decision. Corroboration of the claimant's testimony was not needed, such that admission of the log page was reversible error. *See* Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394, 396 (Tex. 1989). The hearing officer may well have determined, from reviewing the dates on the claimant's claim and employers' supplemental reports of injury (which were put into evidence by the carrier), that there was no failure of notice as much as failure to appreciate that an aggravation of a previous injury was an injury in its own right.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We affirm the decision of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge